85-1198

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN S. MAGEE, Individually and
t/a COLLEGIATE RESEARCH SYSTEMS,

Petitioner,

vs.

HAROLD J. RUVOLDT, JR., Prosecutor
of Hudson County,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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On The Brief

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QUESTIONS PRESENTED

A. Whether *N.J.S.A.* 2A:170-77.16 unconstitutionally infringes upon freedom of speech and freedom of the press.

B. Whether *N.J.S.A.* 2A:170-77.16 is unconstitutionally vague and overly-broad.

C. Whether petitioner was denied equal protection of the laws by alleged selective enforcement of *N.J.S.A.* 2A:170-77.16.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION

I. *N.J.S.A.* 2A:170-77.16 DOES NOT INFRINGE UPON PETITIONER'S FREEDOM OF SPEECH OR FREEDOM OF THE PRESS 11

II. *N.J.S.A.* 2A:170-77.16 IS NOT VAGUE OR OVERLY-BROAD 17

III. THERE IS NOTHING IN THE RECORD TO SUPPORT A CHARGE OF SELECTIVE ENFORCEMENT OF THE LAW IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES 21

IV. PETITIONER WAS NOT ENTRAPPED 22

CONCLUSION 24

TABLE OF AUTHORITIES

	page
Baggett v. Bullitt, 377 *U.S.* 360 (1964)	17
Bates v. State Bar of Arizona, 433 *U.S.* 350 (1970)	16
Bigelow v. Virginia, 421 *U.S.* 809 (1975)	16
Cantwell v. Connecticut, 310 *U.S.* 296 (1940)	14
Griswold v. Connecticut, 381 *U.S.* 479 (1965)	15
Lovell v. City of Griffin, 303 *U.S.* 444 (1938)	15
Oyler v. Boles, 368 *U.S.* 448 (1962)	21
People v. Magee, 423 *N.Y.S.2d* 417 (S.Ct. 1979)	11, 19, 23
Stanley v. Georgia 394 *U.S.* 557 (1969)	16
State v. Rockholt, 96 *N.J.* 570 (1984)	22
State v. Saksniit, 332 *N.Y.S.2d* 343 (S. Ct. 1972)	19
Thomas v. Collins, 323 *U.S.* 516 (1945)	15

TABLE OF AUTHORITIES (continued)

page

United States v. Twelve 200-Foot Reels of Super 8 mm Film, 413 *U.S.* 123 (1973) 16

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 *U.S.* 489 (1982) 17

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 *U.S.* 748 (1976) 16

STATEMENT OF THE CASE

I. Ruvoldt v. Magee (Procedural History):

Petitioner, John S. Magee, operates a business known as Collegiate Research Systems in Hoboken, New Jersey. A verified complaint was filed on April 13, 1983. Petitioner was charged with two violations of *N.J.S.A.* 2A:170-77.16. The complaint sought the imposition of fines and injunctive relief. On May 4, 1983, after a hearing before the Honorable Robert E. Tarleton, J.S.C., the Court issued a preliminary injunction which restrained petitioner from doing acts proscribed by *N.J.S.A.* 2A:170-77.16.

A trial was held before Judge Tarleton (without a jury) on February 15 and 16, 1984. On February 23, 1984, the Court found John S. Magee Guilty of each violation. Fines were imposed, and a permanent injunction was granted.

An appeal was taken to the Superior Court of New Jersey, Appellate Division. In a *per curiam* opinion dated August 15, 1985, the adjudications below were affirmed. On October 15, 1985, the

Supreme Court of New Jersey denied a petition for certification.

The Petition for Writ of Certiorari was served upon Respondent on January 14, 1986.

II. IN THE MATTER OF JOHN S. MAGEE, CHARGED WITH CONTEMPT OF COURT (PROCEDURAL HISTORY):

On January 9, 1984, an Affidavit was filed in the Superior Court of New Jersey asserting that John S. Magee was in contempt of court. Judge Tarleton issued an Order directing petitioner to show cause before the Honorable Gregory J. Castano, J.S.C. why he should not be held in contempt. Trial was held before Judge Castano (sitting without a jury) on January 17, 1984. On January 25, 1984, Judge Castano found John S. Magee to be in contempt of the preliminary injunction dated May 14, 1983. By Order dated February 1, 1984, John S. Magee was sentenced to pay a fine in the amount of five hundred dollars and to be incarcerated for five days in the County Jail.

This matter was consolidated on appeal with the convictions for violationsof *N.J.S.A.* 2A:170-77.16. The adjudication of contempt was affirmed.

III. RUVOLDT V. MAGEE (UNDERLYING FACTS):

On March 24, 1983, in furtherance of an investigation into alleged violations of *N.J.S.A.* 2A:170-77.16, Hudson County Prosecutor's Investigator Donald Wiggins visited Collegiate Research in an undercover capacity. Wiggins recorded his conversation with John S. Magee. Investigator Wiggins ordered an original, fifteen-page paper written to his specifications on nuclear arms control at a cost of $12.00 per page. The tenor of the conversation between Investigator Wiggins and John Magee clearly indicated that the paper was being purchased by a student for submission to an institution of higher education. Petitioner asked whether the paper should be of graduate or undergraduate level, and when Wiggins said "undergraduate," Magee asked "what

year?" Petitioner inquired, "What's your due date?" and Wiggins replied that he had to have it at the end of the semester, but he could get a few brownie points by submitting it a few days early. Wiggins and Magee discussed an article about Collegiate Research which had appeared in a local newspaper. Petitioner assured Investigator Wiggins that he would not get into trouble for dealing with him. Wiggins asked whether the paper would be ready to hand in for the 10th. Magee replied that it would.

In placing his order with John Magee, Investigator Wiggins completed an order form. That form asked for a detailed description of the type of paper. The form contained instructions to the writer telling him (1) what to include in each five-page segment of the paper, (2) whether to prepare a bibliography and (3) if footnotes were to be used, where they should be placed.

On March 29, 1983, Investigator Wiggins returned to Collegiate Research and again recorded his conversation with John Magee. Wiggins paid

Magee $180.00 cash. The paper which Wiggins received had a title page without attribution. The paper was in a format ready to be submitted by a student without the necessity of re-typing.

On March 29, 1983, Prosecutor's Investigator Anthony Scott visited Collegiate Research and also recorded his conversation with John Magee. He purchased term papers (which were in Magee's files) on capital punishment for $70.00. Investigator Scott asked, "There's no problem with this, right? I can hand this right in?" to which petitioner replied that he didn't care what Scott was going to do with it. Magee said that he was just selling it; however, he pointed out, "It's all footnoted." Investigator Scott also asked about the recent newspaper article concerning Collegiate Research. Scott said something about people who "take papers from other people." Petitioner made a nebulous reply.

At trial, John S. Magee asknowledged his voice on the taped conversations with Wiggins and Scott. He gave no explanation of his remarks. Magee

testified that during 1982 and 1983, he employed someone to distribute his business cards on street corners near college campuses. He told the Court that, between September 1982 and April 1983, he sold 206 original papers written to the purchasers' specifications and between April 1983 and February 1984 he sold 357 such papers. These academic papers were prepared by writers whom petitioner employed. John Magee explained that once a paper had been prepared, a copy was placed into the files (for which a catalog was maintained). Thereafter, another student may purchase such a paper from those on file. Petitioner estimated that he sold an equal number of original papers and papers on file. Magee estimated that 95% of his customers between September 1982 and February 1984 were college students.

Petitioner testified that he had been aware of the provisions of *N.J.S.A.* 2A:170-77.16 since the enactment of that law. Prior to moving to 70 Hudson Street, he operated in New York, where he had been enjoined for violating a statute similar to *N.J.S.A.* 2A:170-77.16.

The trial court determined that John S. Magee was in the business of preparing papers on various academic subjects primarily for sale to students in a format that can be submitted under a student's name in fulfillment of academic requirements. Judge Tarleton, in his findings of fact, accurately described Collegiate Research System's as a "term paper mill." The record conclusively and beyond a reasonable doubt convinced the Court that John S. Magee engaged in conduct contrary to *N.J.S.A.* 2A:170-77.16.

IV. IN THE MATTER OF JOHN S. MAGEE, CHARGED WITH CONTEMPT OF COURT (UNDERLYING FACTS):

On May 4, 1983, Judge Robert E. Tarleton entered a preliminary injunction restraining John S. Magee, individually and trading as Collegiate Research Systems, its agents, servants and employees from

> preparing, offering to prepare, selling or offering for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing, or under circumstances having reason to know, that said assignment is

> intended for submission either in whole or substantial part under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy, school or other educational institution for any fee or other remuneration, in violation of *N.J.S.A.* 2A:170-77.16 until the further order of the Court.

On November 30, 1983, Prosecutor's Investigator Terrence Hull placed a telephone call to Collegiate Research and tape-recorded the conversation. Mr. Hull inquired whether he could obtain a five page paper by the following week. Several prices were quoted to Hull. Thereafter, on December 7, 1983, Investigator Hull visited Collegiate Research and recorded his conversation with John Magee. Hull ordered a paper on cocaine and paid $105.00. He filled out an order form (as described *supra*). Investigator Hull asked petitioner whether the blank marked "subject" on the form meant title of the course for which the paper was being written. Magee responded that he did not get involved in any of that and directed Hull's attention to a disclaimer sign hanging nearby. Investigator Hull left and returned a few

minutes later. He changed the topic to heroin, telling petitioner that a friend told him cocaine could not be used for the assignment.

On December 28, 1983, Investigator Hull picked up his paper. He recorded his conversation with John Magee. Hull asked whether there was a danger that someone else might have ordered the same topic. Petitioner assured him that this could not occur. Magee pointed out that the paper had numerous footnotes, to which Hull replied that's what his teacher liked.

The paper purchased by Investigator Hull was in a format which could be handed in without re-typing. The paper had a complete bibliography and extensive footnotes. There was no attribution.

Judge Castano found that the purported disclaimers posted by petitioner were insincere and were merely intended as a defense to any future actions. The Judge determined that Magee had reason to know that the assignment was intended for submission in fulfillment of a student's learning require-

ments. The Court was convinced beyond a reasonable doubt that petitioner had willfully and deliberately violated the preliminary injunction. John S. Magee was adjudicated Guilty of Contempt.

POINT ONE

N.J.S.A. 2A:170-77.16 DOES NOT INFRINGE UPON PETITIONER'S FREEDOM OF SPEECH OR FREEDOM OF THE PRESS.

There is no First Amendment right to aid and abet cheating students to defraud educational institutions. Petitioner claims that he is a mere disseminator of information whose constitutional right of free expression has been abridged by the statute in question. This argument misconceives the statutory restrictions. *N.J.S.A.* 2A:170-77.16 in no way interferes with the content of expression. It does, however, make unlawful the preparation or sale of materials which the seller knows will be used by students in a plagiaristic manner.

In *People v. Magee,* 423 *N.Y.S.* 2*d* 417 (S. Ct. 1979), the Court upheld a similar New York law against the same type of constitutional attack by petitioner herein. Judge Wallach correctly found that even though papers sold by Magee could be used lawfully, the statute interdicting them was not thus

rendered unconstitutional. 423 *N.Y.S. 2d* at 419. He analogized, reasonably, that "(a) gaming device which *could* be played for sheer entertainment may be outlawed if the purpose to which it is put is gambling." *Id.*, at 420. The New York court noted that the *format* of Magee's product was designed for direct submission to an academic institution, and this indicated unlawful intended use. *Id. N.J.S.A.* 2A:170-77.16 does not proscribe the dissemination of ideas. The statute merely proscribes the distribution of term papers, theses, dissertations essays and reports which the distributor knows or, under the circumstances, has reason to know will be used deceptively.

The constitutional protections afforded commercial speech are less than those provided other constitutionally guaranteed expression. Commercial speech may be regulated or banned if it proposes an illegal transaction. In the case at bar, Magee's business is commercial in nature. Collegiate Research Systems distributes its product for an illegal purpose

(to defraud educational institutions). Students obtain papers which they submit fraudulently as their own work. It is proper for the Legislature to regulate such speech, because it proposes an illegal transaction. The tenor and content of Collegiate Research Systems advertising and solicitation are indicative of the unlawful intent of this business operation, the supplying of papers to students so that they may be submitted by these purchasers to their educational institutions in violation of *N.J.S.A.* 2A:170-77.16. Petitioner claims that Collegiate Research Systems is virtually identical to Encyclopedia Britannica Research Service and says that his customers include government and corporate officials and public interest groups, yet, by his own estimate, 95% of petitioner's customers are college students!

Petitioner's conduct is no more deserving of First Amendment protection as free speech than polygamy, the use of drugs (*i.e.*, peyote, marijuana, hashish, LSD), or the handling of poisonous snakes have received under the guise of religious freedom.

In *Cantwell v. State of Connecticut,* 310 *U.S.* (1940), the Supreme Court repeated the "belief - action dichotomy" applicable to First Amendment cases. The Court observed that the First Amendment embraces two concepts — freedomto believe and freedom to act. The first is absolute, but the second cannot be. 310 *U.S.* at 303. The First Amendment guarantees freedom to disseminate information and ideas; however, that amendment does not guarantee petitioner the absolute right to sell his product in a *form* which readily lends itself to deceptive use. The New Jersey Legislature enacted *N.J.S.A.* 2A:170-77.16 in response to a rampant epidemic of plagiarism which was fostered by "ready-to-submit" term papers. The *format* of the product sold by John S. Magee is the essence of the statutory violation. He was not selling research monographs (a mere study aid). Such sales are permitted. See *N.J.S.A.* 2A170-77.17.* Petitioner's sanctimonious and pious invocation of the First Amendment does not alter the reality that he knowingly promoted

plagiarism. The State may and has properly declared such *conduct* to be unlawful. Petitioner is not advancing ideas, nor is he advocating any philosophy. He is simply exploiting a market. His product is clearly a tool of deception. The State may attack such deception *at the source,* and by enactment of *N.J.S.A.* 2A:170-77.16, New Jersey has done so.

The Supreme Court has found laws which inhibit the receipt of information to be unconstitutional. *See Lovell v. City of Griffin,* 303 *U.S.* 444 (1938) [ordinance which prohibited distribution of literature of any kind without permission of city manager]; *Thomas v. Collins,* 323 *U.S.* 516 (1945) [law which required union organizer to register before soliciting members]; *Griswold v. Connecticut,* 381 *U.S.* 479 (1965) [law which penalized anyone who assisted or counseled (*ie.*, provided information about) use of

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* Nothing contained in this act shall prevent any person from providing tutorial assistance, research material, information or other assistance to persons enrolled in a university, college, academy, school or other educational institution, which is not intended for submission directly or in substantial part as an assignment under the student's name to such educational institution in fulfillment of the requirements for a degree, diploma, certificate or course of study. . . .

contraceptives]; *Bigelow v. Virginia*, 421 *U.S.* 809 (1975) [law which proscribed dissemination of information about the availability of abortions in New Jersey, where they were legal]; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 *U.S.* 748 (1976) [statute which prohibited advertisement by licensed pharmacists of prices for prescription drugs]; *Bates v. State Bar of Arizona, 433 U.S.* 350 (1970) [prohibition on advertisement of fees for legal services]. The Court distinguished the right to *possess* obscene material in the privacy of one's home — *Stanley v. Georgia*, 394 *U.S.* 557 (1969) — from the right to distribute such material. *United States v. Twelve 200-Foot Reels of Super 8mm Film*, 413 *U.S.* 123 (1973). Students have a constitutional right of access to information; however, the First Amendment does not guarantee the right to have a term paper, thesis or dissertation "ghost-written".

POINT TWO

N.J.S.A. 2A:170-77.16 IS NOT VAGUE OR OVERLY-BROAD.

The product sold by Collegiate Research Systems constitutes "commercial speech," not "pure speech." The overbreadth doctrine does not apply to commercial speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 496-497 (1982).

A statute falls for vagueness if men of common intelligence must necessarily guess at its meaning and differ as to its application. *Baggett v. Bullitt*, 377 *U.S.* 360, 367 (1964). *N.J.S.A.* 2A:170-77.16 must be read in conjunction with *N.J.S.A.* 2A:170-77.17. The legislative intent is clear. The average reasonable man cannot fail to recognize a "term paper," "thesis" or "dissertation." These forms of exposition are readily distinguishable from a study guide or research monograph.

Petitioner asserts that the subject statute does not define the offense in unmistakable language. The

statute allows some research to be prepared and sold but prohibits it where the seller knows or where from attendant circumstances he has reason to know that the material is intended for submission under a student's name to fulfill a course requirement. Petitioner asserts that he is being held liable based upon the intent of his customer. Magee alleges that such a transferred intent renders the statue unconstitutionally vague. This analysis is not applicable to *N.J.S.A.* 2A:170-77.16. Petitioner's guilt is not based upon the buyer's intent but upon petitioner's knowledge.* That knowledge is inferred from the seller's statements to purchasers and purchasers' statements to the seller. Knowledge is also inferred from a pattern of marketing that suggests, encourages and fails to *properly* discourage unlawful use of the product.

From the conversations between Magee and the Prosecutor's Investigators, it is clear that peti-

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* The fact that neither Investigator Wiggins nor Investigator Scott was actually a student enrolled in an academic institution and that neither actually intended to submit the papers sold by petitioner in fulfillment of course requirements is irrelevant to Magee's culpability.

tioner knew he was dealing with purported students who wanted to buy papers to hand in for course assignments; Petitioner's pattern of marketing, as shown by his advertising, is geared towards the college student, and, as indicated in *People v. Magee, supra.* at 420, "These typewritten papers, in a format designed for direct submission, and taken together with the defendant's seductive sales literature are full proof of unlawful intended use."

Petitioner's arguments that his services are comparable to legitimate research services provided by companies such as Encyclopedia Britannica are specious. There are significant differences in format, in attribution, in design and, most particularly, in purpose between such organizations and Collegiate Research Systems. See *State v. Saksniit,* 332 *N.Y.S* 2*d,* 343, 348-349 (S.Ct. 1972).

Petitioner asserts that the statute is also vague because it allows a finding of guilt not only based on actual knowledge but also under circumstances where the seller has reason to know that the

paper will be put to the prohibited use. It should be noted that Judge Tarleton found beyond a reasonable doubt *actual* knowledge on Magee's part. Referring to the conversations between Wiggins and Scott and Magee, Judge Tarleton found that Magee had engaged on those dates in the sale of a paper which Magee *knew* was intended for submission to an educational institution in violation of the statute. Findings of the trial court indicate that Magee knew the intention of the purchasers when he made these sales. The Judge also found Magee's assertions to the contrary to be unbelievable.

BEST A

POINT THREE

THERE IS NOTHING IN THE RECORD TO SUPPORT A CHARGE OF SELECTIVE ENFORCEMENT OF THE LAW IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner argues that his right to equal protection of the law has been violated by the selective enforcement of *N.J.S.A.* 2A:170-77.16 against him by respondent. There is nothing in the record to suggest any support for this position. Some selectivity in the enforcement of the law is not a denial of constitutional rights. Equal protection is denied only if the selection is deliberately based upon impermissible standards such as race, religion or other arbitrary classification. *Oyler v. Boles*, 368 *U.S.* 448, 456 (1962). The facts do not support the selection of John S. Magee for investigation based upon any such impermissible criteria. Rather, petitioner was prosecuted for a violation of this statute because the notorious manner in which he was flaunting the law came to the attention of respondent.

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POINT FOUR

PETITIONER WAS NOT ENTRAPPED.

Both Judge Tarleton and Judge Castano found that petitioner had not been entrapped. The most recent expression by the Supreme Court of New Jersey on the law of entrapment is found in *State v. Rockholdt*, 96 *N.J.* 570 (1984). There the Court held that under the Penal Code, the burden to prove entrapment is upon the defendant (by a preponderance of the evidence). To establish entrapment, a defendant must show both (1) that the police conduct created a substantial risk that the crime would be committed by a person not disposed to commit it and (2) that the police conduct caused the particular defendant to commit the crime. John S. Magee has failed to establish either.

The facts in the present case demonstrate clearly that John S. Magee was someone in the business of supplying papers to students in violation of *N.J.S.A.* 2A:170-77.16. Magee's comments to the Investigators, his marketing approach and the

format of the products pointed to the inescapable conclusion that his normal operating procedure was violative of the statute. His business was, as characterized by Judge Tarleton, a "Term Paper Mill." His past history, as evidenced in *People v. Magee,* 423 *N.Y.S. 2d* 467 (S.Ct. 1979), negates any argument that he was not predisposed to violate the statute.

Petitioner was not solicited to commit the offense. He was, in fact, advertising his availability to perform these services. The Investigators' conversations with Magee merely provided petitioner with an opportunity to manifest his intention. Petitioner, in his comments to the Investigators, made it apparent that he was aware of the ostensible purpose of the sale of his material. It should be noted that in the New York case, undercover operatives were also utilized by the Attorney General's Office to establish that Magee was violating that Court's preliminary injunction. *People v. Magee, supra.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be **DENIED.**

Respectfully submitted,

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BY: _____
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